

a

KENCANA TGI SDN BHD

v.

TANJUNG PINANG DEVELOPMENT SDN BHD

b

HIGH COURT MALAYA, PENANG

RK NATHAN J

[CIVIL SUIT NO: 22-222-2001]

10 AUGUST 2001

c

CIVIL PROCEDURE: *Injunction - Ex parte - Change of circumstances - Whether ex parte injunction to remain - Factors to consider*

CIVIL PROCEDURE: *Injunction - Inter partes - Factors to consider - Whether status quo to remain - In whose favour balance of convenience lies*

d

By way of three written agreements (the letter of award, the supplemental letter of award and the development agreement) the defendant granted the plaintiff a concession to reclaim 235.41 acres of sea-front land (the reclamation project). It was a term of the agreement that the entire cost and labour of the reclamation project was to be borne by the plaintiff. In consideration thereof the defendant agreed to transfer beneficially to the plaintiff 81.19 acres of the reclamation project upon the plaintiff completing the project.

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On or about 2 May 2001, the plaintiff received a certificate pursuant to cl. 39.1 of the development agreement from the defendant's agent alleging that the plaintiff was not executing the works in accordance with the agreement. The plaintiff protested by replying to the defendant *vide* letter dated 4 May 2001. In reply the defendant gave notice by way of two letters dated 11 May 2001 and 17 May 2001 of its intention to enter upon the site and to expel the plaintiff.

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The plaintiff filed a statement of claim and subsequently prayed for an injunction to restrain the defendant from preventing the plaintiff from proceeding with the reclamation project and also to prevent the defendant from taking possession of the site and continuing with the said project. The plaintiff took out an *ex parte* application for the injunction and such order was granted. The *inter partes* application was fixed for hearing (encl 6).

*g**h*

The plaintiff then amended the statement of claim and maintained the prayer wherein declarations were sought to the effect that (a) the agreement was binding and effective between the parties and that (b) it was the defendant who had breached the said agreement.

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In the meantime the defendant filed an application to set aside the *ex parte* injunction granted to the plaintiff (encl. 8).

Held:

[1] On the issue of encl. 8, the learned judge was persuaded to grant an *ex parte* injunction on the argument that the certificate was issued on a non-existent agreement. The plaintiff in the meantime amended the statement of claim and the effect of doing so was to acknowledge the existence of the agreement. This clearly meant that whilst on the one hand the plaintiff was contending that the agreement was invalid for lack of a date and signatures, yet on the other hand the plaintiff was itself relying on that very same agreement that it was decrying as invalid. (p 387 g-h)

[1a] It was therefore insufficient for the court to allow the defendant's application with costs without even calling upon the defendant to reply. (p 387 i)

[2] On the issue of encl. 6, it must be noted that the project manager, being a representative of the defendant must have made the decision to protect the interest of the defendant. His decision therefore could not have been independent. (p 389 h)

[2a] The court therefore must stand as a bulwark and protect a party that complains that the decision was not independent because the law requires such an arbiter to be independent in arriving at his judgment. (p 389 h)

[2b] Until then the *status quo* must be maintained and the balance of convenience clearly lies in favour of granting the plaintiff its injunction. (p 389 h-i)

[Ordered accordingly.]

Case(s) referred to:

Canterbury Pipe Lines Ltd v. The Christchurch Drainage Board 16 BLR 86 (**dist**)
Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 (**refd**)
Si Rusa Beach Resort Sdn Bhd v. Asia Pacific Hotels Management Pte Ltd [1984] 2 CLJ 13; [1984] 1 CLJ (Rep) 346 (**refd**)

Legislation referred to:

Specific Relief Act 1950, s. 20(1)(a)

For the plaintiff - Haris Ibrahim (Richard Huang); M/s Peter Huang & Richard
For the defendant - Tan Sri Dato' Zaki Tun Azmi (Celine Chelladurai); M/s Rashid & Lee

Reported by Mariette Peters-Goh

*a***JUDGMENT****RK Nathan J:****Facts**

b By way of three written agreements dated 28 April 1999 (the letter of award), 15 June 1999 (supplemental letter of award) and 21 October 1999 (the development agreement), collectively called the agreement, the defendant granted the plaintiff a concession to reclaim 235.41 acres of sea-front land facing Mukim 18 Daerah Tanjung Tokong (the reclamation project). It was, *inter alia*, a term of the agreement that the entire cost and labour of the

c reclamation project was to be borne by the plaintiff. Towards this end the plaintiff was to prepare a layout plan. In consideration thereof the defendant agreed to transfer beneficially to the plaintiff 81.19 acres of the reclamation project upon the plaintiff completing the said project. The plaintiff completed the reclamation of 41.48 acres of the said reclamation project.

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It is the plaintiff's case as pleaded in the initial statement of claim that it had up to date spent a sum in excess of RM7 million even though the country was economically not fully stable. On or about 2 May 2001 the plaintiff was surprised to receive a photostat copy of a certificate dated 2 May 2001 from the defendant's agent, its project manager, Pengurusan Lebuhraya Berhad. The

e said certificate is reproduced herewith.

PENGURUSAN 8th Floor, Menara 2, Faber Towers
LEBUHRAYA Jalan Desa Bahagia, Taman Desa,
BERHAD 58100 Kuala Lumpur, Malaya

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Tel. (03)783 2833
Fac. (03)78 3289/781 2987

Our Ref: PLB/E/TPP/DE/GE/00373-01

2 MAY 2001

g

Tanjung Pinang Development Sdn Bhd
No. 5 Jalan 217
P.O. Box 50
45700 Petaling Jaya

h

Attn Encik Ismail Mohd Isa

Dear Sirs

TANJONG TOKONG LAND RECLAMATION PROJECT - PHASE 1

Certification Pursuant to Clause 39.1 of the **Development Agreement**

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In view of the past performance of the Contract, it is hereby certified pursuant to Clause 39.1 of the Development Agreement that in the opinion of the Project

Manager, Kencana TGI Sdn Bhd is not executing the Works in accordance with the Agreement and/or is persistently neglecting to carry out his obligations under the Agreement. **a**

Yours faithfully
PENGURUSAN LEBUHRAYA BERHAD

sgd. DATO' ZAIDAN HAJI OTHMAN **b**
Executive Chairman

c.c. Kencana TGI Sdn Bhd .. Tuan Haji Shaik Mohd
Hussain Abdul Aziz

It is also necessary to reproduce clause 39.1 of the Development Agreement which reads as follows: **c**

39.1 Forfeiture

If KTGI shall become bankrupt or have a receiving order made against him or shall present his petition in bankruptcy or shall make an agreement with or assignment in favour of his creditors or shall agree to carry out the Agreement under a committee of inspection of his creditors or (being a corporation) shall go into liquidation (other than a voluntary liquidation for the purposes of amalgamation or reconstruction to which TPD has given his prior written approval (which shall not be unreasonably withheld) or in the event of any analogous event under the laws of the country in which KTGI is incorporated or if KTGI shall assign the Agreement without the consent in writing of TPD first obtained or shall have an execution levied on his goods or if the Project Manager shall certify in writing to TPD that in his opinion KTGI: **d**

(a) has abandoned the Agreement; or **f**

(b) without reasonable excuse has failed to commence the execution of the Works or has suspended the progress of the execution of the Works or the development of the Subject Property for twenty-eight (28) days after receiving from the Project Manager written notice to proceed; or

(c) has failed to remove materials or equipment from the Site which in the opinion of the Project Manager are not in accordance with the Agreement within the time specified by the Project Manager; or **g**

(d) is not executing the Works or the development of the Subject Property in accordance with the Agreement or is persistently or flagrantly neglecting to carry out his obligations under the Agreement shall be deemed to constitute persistent neglect under this Clause 39.1(d); or **h**

(e) has to the detriment of good design or workmanship or in defiance of the Project Manager's instructions to the contrary sub-let any part of the Works; or **i**

- a* (f) has persistently neglected to carry out the written instructions of the Project Manager despite previous warnings;
- then TPD may after giving fourteen (14) Days notice in writing to KTGI enter upon the Site and expel KTGI therefrom without thereby avoiding the Agreement or releasing KTGI from any of his obligations or liabilities under the Agreement or affecting the rights and powers conferred on TPD or the Project Manager by the Agreement and may himself carry out the Works and call upon the performance bond and TPD or such other contractor may use for such carrying out of the Works so much of the plant, temporary works or materials on the Site as he or they may think proper.
- b*
- c* As soon as the plaintiff received the said certificate pursuant to cl. 39.1 of the development agreement, the plaintiff protested to the defendant and replied by its letter dated 4 May 2001. The said letter is also reproduced herewith:
- May 4, 2001
- d* Tanjung Pinang Development Sdn Bhd
No. 5, Jalan 217, P.O. Box 50
46700 Petaling Jaya
- Attn: Encik Ismail bin Mohd Isa
- e* TANJONG TOKONG LAND RECLAMATION PROJECT - PHASE 1
- Certification Pursuant to Clause 39.1 of the **Development Agreement**
- We strongly take objection to PLB letter ref: PLB/E/TTP/DE/GE/000373-01 dated May 2, 2001 which alleged that we have failed to carry out our obligation pursuant to clause 39.1 of the Development Agreement.
- f*
- Firstly the letter does not contain particulars of our neglect and secondly we have not received any notice from the Project Manager under Clause 39.1(b).
- Kindly clarify soonest possible.
- g* Yours faithfully
- KENCANA TGI SDN BHD
- sgd.
- h* SHAIK MOHD HUSSAIN ABDULLAH
MANAGING DIRECTOR
- SMHAA/fy
- i* In reply the defendant gave notice by way of two letters dated 11 May 2001 and 17 May 2001 of its intention to enter upon the site on 25 May 2001 and to expel the plaintiff. The letter dated 11 May 2001 was the notice of forfeiture

pursuant to cl. 39.1 of the development agreement. The letter dated 17 May 2001 was in response to the plaintiff's letter dated 4 May 2001. This letter directed the plaintiff to refer any queries or comments to the project manager. The plaintiff then referred the defendant to cl. 42 of the development agreement which reads as follows:

42.1 Settlement of Disputes - Arbitration

- (a) Arbitration of any dispute or difference of any kind whatsoever which shall arise between TPD or the Project Manager on the one hand and KTGI on the other hand in connection with or arising out of the Agreement or execution of the Works or the development of the Subject Property (whether during the progress of the execution of the Works or the development of the Subject Property and whether before or after the determination, abandonment or breach of the Agreement shall not be commenced unless an attempt has first been made by the parties to settle such dispute amicably; such attempt will take the form of a mediation in accordance with the Rules set out in Appendix 3 by an agreed third party neutral or failing agreement by a neutral appointment by the President, for the time being, of the Board of Engineers.
- (b) Any dispute in respect of which amicable settlement has not been reached as aforesaid shall be referred to an arbitrator to be agreed upon between the parties or failing agreement to be nominated on the application of either party by the Director for the time being of the Regional Centre for Arbitration in Kuala Lumpur and any such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act No. 93 (Revised 1972) of Malaysia or any other law amending or replacing this Act.
- (c) Such arbitrator shall have full power to open up review and revise any decision, opinion, direction, certificate or valuation of the mediator and neither party shall be limited in the proceedings before such arbitrator to the evidence or arguments put before the mediator for the purpose of obtaining his decision above referred to.
- (d) The award of the arbitrator shall be final and binding on the parties. Such reference except to the withholding by the Project Manager of any certificate or the withholding of any portion of the exercise of the Project Manager's power to give a certificate under Clause 38.1 shall not be opened until after the Date for Substantial Completion or the termination or alleged termination of KTGI's employment under the Agreement unless with the written consent of TPD and KTGI. Provided always that the giving of a Certificate of Substantial Completion for the whole of the Works under Clause 33 shall not be a condition precedent to the opening of any such reference.

- a* There was no response from the defendant to this. The plaintiff pleaded in the initial statement of claim that since the development agreement was not dated it is unenforceable and therefore not binding on the parties and therefore the certificate and the notice of forfeiture given by the defendant cannot be enforced. Since the plaintiff was willing and ready and able to proceed with the project, the plaintiff prayed for a declaration that the agreement was binding and effective between the parties and that it was the defendant who had breached the development agreement. There was also a further prayer for a declaration (and this was not even pleaded as an alternative) that since the development agreement was undated it ought to be declared unenforceable.
- b*
- c* There was also a prayer for specific performance of the agreement, a claim for damages and a prayer for an injunction to restrain the defendant or its servant or agent from preventing the plaintiff from proceeding with the reclamation project and also to prevent the defendant from taking possession of the site and continuing with the said project.
- d* Soon thereafter the plaintiff took out an *ex parte* application for the said injunction with a certificate of urgency. On 22 May 2001 my learned brother Tee Ah Sing J granted the *ex parte* order. The *inter partes* application (encl. 6) was fixed for hearing on 8 June 2001. The defendant entered appearance on 28 May 2001. In the meantime on 6 June 2001 the plaintiff filed an amended statement of claim. In that amended statement of claim the plaintiff withdrew the prayer for a declaration to invalidate the development agreement because of the absence of a date. The plaintiff maintained the two earlier prayers wherein declarations were sought to the effect that:
- e*
- f* (a) the agreement was binding and effective between the parties; and
- (b) that it was the defendant who had breached the said agreement. The additional prayers sought were:
- (c) a declaration that the Project Manager had failed to particularise the specific charges or details of negligence in the performance of work and that therefore the said Certificate issued under cl. 39.1 is unenforceable.
- g*
- (d) A declaration that since the plaintiff was not negligent in any way in the performance of its work, there was no basis for the issuance of the notice of forfeiture and this would amount to a breach of contract by the defendant.
- h*
- As an alternative to prayers (c) and (d), the plaintiff prayed for the following:
- (cc) a declaration that the conduct of the defendant in issuing the notice of forfeiture was tantamount to breaching the contract.
- i*

(dd) a declaration that the issue of the plaintiff's negligence or otherwise in the performance of its work ought to be referred to the arbitrator. a

In the meantime the defendant also filed an application to set aside the *ex parte* injunction granted to the plaintiff (encl. 8). By consent parties agreed that I hear both encls. 8 and 6 together. However, I found it appropriate to hear encl. 8 first. Having heard arguments I allowed the plaintiff's prayer and set aside the *ex parte* order granting the injunction on 22 May 2001 and also ordered that an enquiry be heard for the assessment of damages with costs. Against that order the plaintiff has appealed. b

Finding Of The Court c

Enclosure 8

The moment the plaintiff filed an amended statement of claim seeking different prayers, it ought to have known that its basis for seeking the *ex parte* order for an injunction, no longer existed. Since only the plaintiff's version was before the learned judge who granted the *ex parte* order, any substantial variation of the pleadings must mean that the plaintiff itself has acknowledged that its application for the injunction based on the earlier pleadings ought not to stand. In the earlier prayer (c) the plaintiff sought a declaration that the development agreement being undated and unsigned is unenforceable. In the amended statement of claim the plaintiff has significantly deleted this prayer and instead substituted it with a new prayer (c) seeking a declaration that since the project manager had failed to particularise the specific charges or details of negligence in the performance of works, the said certificate issued under cl. 39.1 is unenforceable. d
e

In other words the learned judge was persuaded to grant an *ex parte* injunction on the argument that the certificate was issued on a non-existent agreement. However now the plaintiff merely argues that since the certificate did not specify details of negligence, the certificate is invalid. The plaintiff therefore does not dispute the development agreement. To my mind such an about turn is tantamount to a total misrepresentation before the learned judge. In fact in answer to a question by me addressed to Huang who argued the matter for the *ex parte* injunction, Huang readily agreed that in the course of his submission before the learned judge he had indeed relied on cl. 39.1 of the development agreement. This clearly meant that whilst on the one hand the plaintiff was contending that the development agreement was invalid for lack of a date and signatures, yet on the other hand the plaintiff was itself relying on that very same development agreement that it was decrying as invalid. Surely the plaintiff cannot approbate and reprobate. On this issue alone it was sufficient for me to allow the defendant's application with costs without even calling upon the defendant to reply. f
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a *Enclosure 6*

- In arguing for a fresh *inter partes* injunction Haris Ibrahim with his usual candour conceded that within the framework of the development agreement the defendant was entitled to appoint a project manager who issued the certificate under cl. 39.1 of the said agreement. I note that as soon as the plaintiff became aware of the said notice, the plaintiff forthwith denied the allegations contained in the said certificate. However the defendant, as a follow-up issued the forfeiture notice dated 11 May 2001 and gave the required 14 days before taking possession of the site. In response to the plaintiff's protest as contained in its letter dated 4 May 2001, the defendant by its letter dated 17 May 2001 requested the plaintiff to write to the project manager for any queries. The plaintiff then gave notice by its letter dated 14 May 2001 of its intention to refer the matter to arbitration pursuant to cl. 42. The plaintiff disputes any suggestion that it had been delinquent nor that it had breached the agreement.
- b*
- c*
- d* Having considered the submissions of both parties I allowed the plaintiff's application to maintain *status quo*. This is the defendants' appeal against that decision in granting the plaintiff its injunction.

- Tan Sri Zaki for the defendant argued that once the project manager made an objective and independent decision and which was reflected by the defendant giving the notice pursuant to cl. 39.1, such a decision must stand since the parties had agreed to the appointment of the project manager pursuant to the terms of the development agreement. Whist that may be so, the project manager must base his findings on some factual basis that must be disclosed to the plaintiff. Besides the question of the independence of the project manager's decision has been challenged. Haris referred me to cl. 2.1 of the development agreement which reads as follows:
- e*
- f*

- The Project Manager shall be the representative and agent of TPD in carrying out any and all of his duties (including without limitation thereto the issue of any certificate) under the Agreement and shall act solely on behalf of TPD, and shall not have any independent role whatsoever.
- g*

- Clause 2.1 cannot be any more specific. Even if the project manager wants to be independent he cannot do so. He must solely act for and protect the interest of the defendant. How then can it be said that his decision was independent? On this ground alone I was bound to maintain *status quo* and had to grant the plaintiff's prayer for an injunction until the court looks into the project manager's complaints. In a New Zealand Court of Appeal's decision in *Canterbury Pipe Lines Ltd v. The Christchurch Drainage Board* 16 BLR 86, McMullin J said at p. 111/112 as follows:
- h*

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The position of an engineer in whom a power to dictate the course of work or to give certificates as to its value is often a delicate one. He must, in a sense, sometimes be a judge in his own quarrel. (Bowen LJ in *Jackson v. Barry Railway Co* [1893] 1 Ch 238 at 247). Whether he is a mere agent for the owner or is under some duty to the contractor depends on the construction of the contract. In the present case, the engineer was given considerable powers under the contract and, in his power to certify for progress payments due to appellant for work done, he was in a position to determine the remuneration of the contractor and thereby exercise considerable economic pressure on him. His position was similar to that of the certifying engineer in *Dixon v. South Australian Railways Commissioner* [1973] 34 CLR 71, of whom Isaacs J said:

As a matter of construction and legal effect, I entertain no personal doubt that the bargain between the parties impliedly connoted a condition upon which the contractor consented that the Commissioner's own servant, the Chief Engineer, should be empowered as arbitrator to finally determine the remuneration of the contractor for the work he performed. That condition was that the Chief Engineer should preserve his independence and impartiality towards both parties, subject only to whatever might be the necessary effect of honest and faithful performance of his proper duties as owner's agent within the true meaning of the contract, and that when once a dispute arose, such independence and impartiality were to be reserved even though that involved depriving the owner of the Chief Engineer's assistance as his exclusive agent in connection with the matters in dispute.

This passage was adopted by North P in *C. Hatrick (NZ) v. Nelson Carlton Construction Co Ltd* NZLR 144 at 150. Appellant was entitled to expect that the engineer would preserve his independence and impartiality and had the right to demand that, whatever views the engineer might have formed, he would be ready to listen to argument and to determine any matter after all had been said and heard (*Jackson v. Barry Railway Co* (*supra*) at 247, per Bowen LJ).

It is obvious therefore that the courts endeavour to protect the independent judgment of the arbitrator chosen by the respective parties be he an engineer, an architect or as in this case, the project manager. However, since in this case the agreement stipulates that the project manager shall not be independent then, notwithstanding the fact that the plaintiff has entered into such an agreement, the court must stand as a bulwark and protect a party that complains that the judgment was not independent because the law requires such an arbitrator to be independent in arriving at his judgment. Whether the plaintiff ought to succeed, having agreed to this clause, is a matter left for trial. Until then the *status quo* must be maintained and the balance of convenience clearly lies in favour of granting the plaintiff its injunction.

a In any case in a reply affidavit (encl. 15) the pengarah project of the defendant said in para. 5 of the said affidavit as follows:

b 5. Saya dinasihati peguamcara Defendan dan sesungguhnya percaya bahawa kesemua isu-isu fakta yang dipertikaikan oleh Defendan dan dibangkitkan oleh Plaintiff adalah isu-isu yang harus ditentukan semasa perbicaraan penuh tindakan ini dan adalah tidak relevan kepada prinsip-prinsip yang harus dipertimbangkan dalam permohonan untuk injunksi dalam keadaan di mana hak “forfeiture” telah digunakan.

c Since the defendant itself is of the view that all issues must go for trial, it is only proper that status quo be maintained until trial. Section 20(1)(a) of the Specific Relief Act 1950 (the Act) reads as follows:

20. Contracts not specifically enforceable.

(1) The following contracts cannot be specifically enforced:

d (a) a contract for the non-performance of which compensation in money is an adequate relief;

e It is the defendant’s case that since the subject matter relates to a contract which is premised on monetary remuneration the plaintiff is precluded by s. 20(1)(a) of the Act from obtaining an injunction. I reject this argument because if that be the case every agreement results in monetary remuneration and therefore no injunction can ever be applied for in respect of all such contracts. That cannot be the law. This case deals with the plaintiff’s right to reclaim land and the reserved right of the defendant to recover possession of the site. Therefore s. 20(1)(a) of the Act has no place in this case.

f Another argument raised by the defence was that since the plaintiff herein is a contractor and thus merely has a licence, he therefore ought not to be granted an injunction. I have to reject all these arguments. In *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293 the Court of Appeal considered all these issues and following the decision of the Federal Court in *Si Rusa Beach Resort Sdn Bhd v. Asia Pacific Hotels Management Pte Ltd* [1984] 2 CLJ 13; [1984] 1 CLJ (Rep) 346, held that at this stage of the interlocutory proceedings all that the judge had to decide was that there are serious issues to be tried that have arisen for trial. There is no need for me at this stage to decide all these issues. In any case the issue of the plaintiff merely being a licence holder had not been raised in the affidavits.

g In order to allow for the project manager to continue his role under the agreement the plaintiff asked that the said project manager be allowed entry into the site. Haris Ibrahim thus sought to amend para. (b) of encl. 6 to include
h “memasuki untuk tujuan mengambil alih” and to delete “dan/atau mengambil alih”. I allowed the amendment and granted the following prayers:
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1. An injunction to restrain the defendant through its directors, servants or agents from:
 - (a) threatening or preventing the plaintiff from entering the reclamation project.
 - (b) entering the reclamation project with a view to taking over the works.
2. An undertaking be given by the plaintiff to:
 - (i) pay damages in the event the defendant had suffered because of this order.
 - (ii) serve a copy of this order on the defendant and to inform the defendant that non-compliance would result in committal proceedings being commenced by the plaintiff.
3. that the plaintiff be at liberty to commence committal proceedings forthwith without notice against breach of any of the orders herein.
4. Costs in the cause.

At the close of the hearing the defendant applied for a stay pending appeal. The plaintiff objected to this. Since no other grounds other than a stay pending appeal was presented to the court, I disallowed a stay.

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